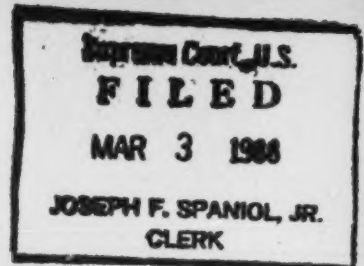


(2)
No. 87-1304



IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

BERNHARD ROSEE, Petitioner,

v.

**COMMODITY FUTURES TRADING COMMISSION, A
Federal Agency, and BOARD OF TRADE OF
THE CITY OF CHICAGO, An Illinois
Corporation, Respondents.**

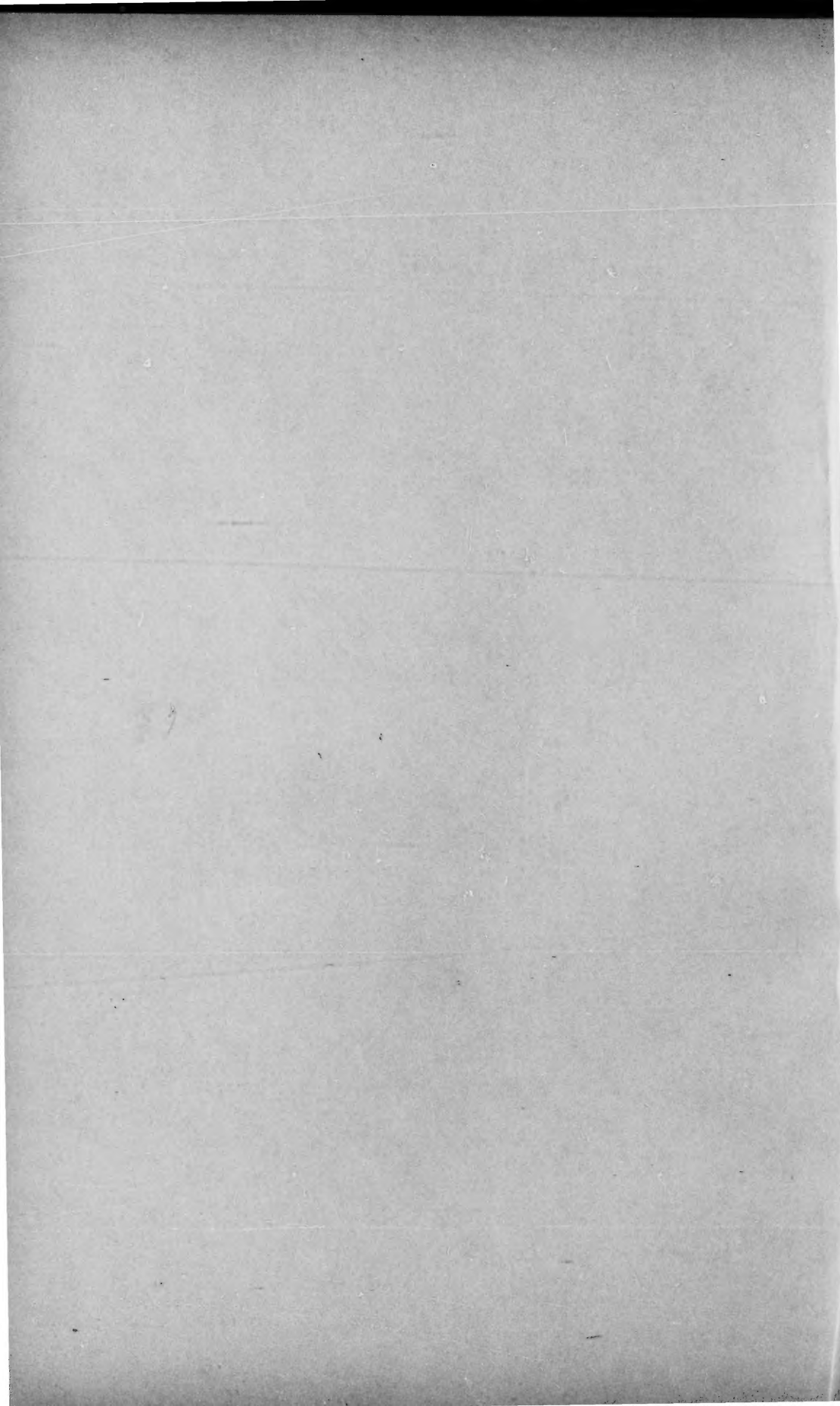
**On Petition for a Writ of Certiorari
to the United States Court of
Appeals for the Seventh Circuit**

**BRIEF OF RESPONDENT BOARD OF
TRADE OF THE CITY OF CHICAGO
IN OPPOSITION**

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Board of Trade of the City
of Chicago**

22 p



QUESTION PRESENTED

Under this Court's decision in Heckler v. Chaney, 470 U.S. 821 (1985), the Commodity Futures Trading Commission, a federal regulatory agency, has absolute discretion not to take enforcement action against a CFTC-regulated futures exchange. Finding no basis for such action, the CFTC declined to institute enforcement proceedings against respondent Board of Trade of the City of Chicago at petitioner's request in this case.

Petitioner apparently seeks to raise the following question for review:

Whether there is an exception to the presumptive unreviewability of CFTC decisions not to take enforcement action against CFTC-regulated futures exchanges if such a decision violates a third-party's constitutional rights by depriving

him of property without due process of
law?

RULE 28.1 LIST

Respondent Board of Trade of the City of Chicago has no parent companies. The MidAmerica Commodity Exchange and Chicago Rice and Cotton Exchange are affiliated with the Board of Trade and C-B-T Corporation is a wholly-owned subsidiary of the Board of Trade.

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<u>Rosee v. Board of Trade</u> , No. 63 C 1348 (N.D. Ill. June 13, 1966), <u>aff'd</u> , Nos. 15886 and 16373 (7th Cir. May 28, 1968), <u>cert. denied</u> , 393 U.S. 1055, <u>reh'g denied</u> , 393 U.S. 1124 (1969)	3 n.2
<u>Rosee v. Board of Trade</u> , No. 63 C 1348 (N.D. Ill. Aug. 24, 1982) . . .	5
<u>Rosee v. Board of Trade</u> , No. 63 C 1348 (N.D. Ill. Jan. 6, 1984) . . .	6, 10
<u>Rosee v. Board of Trade</u> , No. 61 S 4153 (Superior Court, Cook County) (unknown date)	2 n.1
<u>Rosee v. Board of Trade</u> , No. 58-379 (Circuit Court, Cook County Jan. 12, 1972), <u>aff'd in relevant part and rev'd in part</u> , 43 Ill.App.3d 203 (1976), <u>appeal dismissed</u> , 65 Ill.2d 580, <u>cert. denied</u> , 434 U.S. 837 (1977) . . .	3, 4, 9, 10

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COMMODITY FUTURES TRADING COMMISSION,
A Federal Agency, and BOARD OF TRADE
OF THE CITY OF CHICAGO, An Illinois
Corporation, Respondents.

BRIEF OF RESPONDENT BOARD OF TRADE
OF THE CITY OF CHICAGO IN OPPOSITION

Respondent Board of Trade of the City of Chicago respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the Seventh Circuit's decision in this case.

STATEMENT OF FACTS

This action arises out of a nearly thirty-year-old dispute between petitioner Bernhard Rosee and Baggot and Morrison, the firm that cleared Mr. Rosee's trades on the Chicago Board of Trade. (Pet. 3;

Pet., Appendix A at 4-5) That dispute, which concerned Mr. Rosee's responsibility for trading losses attributed to him by Baggot and Morrison, was submitted to the Board of Trade's Arbitration Committee, and was decided adversely to Mr. Rosee in 1960. Because Mr. Rosee refused to pay the \$11,323.78 arbitration award entered against him, his Board of Trade membership was suspended and, ultimately, sold in accordance with the Board's rules.

Following aborted actions in the state and federal courts, 1/ Mr. Rosee

1/ Mr. Rosee nonsuited his initial state court action. Rosee v. Board of Trade, No. 61 S 4153 (Superior Court, Cook County) (unknown date). His initial federal court action was dismissed for lack of federal jurisdiction. Rosee v. Board of Trade, No. 61 C 1066 (N.D. Ill.) (unknown date), aff'd, 311 F.2d 524 (Footnote Continued)

again sued in state court to regain the Board of Trade membership he had forfeited. After removal to federal court, and summary judgment in favor of the government employees named as defendants, 2/ that action was remanded to the Circuit Court of Cook County, tried, and decided in favor of the Board of Trade. Rosee v. Board of Trade, No. 58-379 (Jan. 12, 1972), aff'd in relevant part and rev'd in part, 43 Ill. App. 3d 203 (1976), appeal dismissed, 65 Ill. 2d 580, cert. denied, 434 U.S. 837 (1977).

(Footnote Continued)

(7th Cir.), cert. denied, 374 U.S. 806 (1963).

2/ Rosee v. Board of Trade, No. 63 C 1348 (N.D. Ill. June 13, 1966), aff'd, Nos. 15886 and 16373 (7th Cir. May 28, 1968), cert. denied, 393 U.S. 1055, reh'g denied, 393 U.S. 1124 (1969).

On appeal, the Illinois Appellate Court for the First District affirmed the trial court's judgment in favor of the Board of Trade and held that the arbitration proceedings were fair and impartial.^{3/} Rosee v. Board of Trade, 43 Ill. App. 3d at 238. The appellate court flatly rejected Mr. Rosee's allegations, renewed before this Court (Pet. 3-8), that the arbitration award had been procured or tainted by perjury or fraud and that he had been denied due process. Id. at 238, 248. That decision has withstood Mr. Rosee's prodigious and continuing efforts to rehash the same claims.^{4/}

^{3/} The petition incorrectly states that the trial court's decision was vacated. (Pet. 4)

^{4/} See infra Appendix A.

More than ten years ago, Judge Barrington D. Parker held that petitioner's purported claims against the Board of Trade were barred under the doctrines of res judicata and collateral estoppel because "Mr. Rosee has had his day in court." Rosee v. Bergland, No. 76-1721 (D.D.C. Apr. 26, 1977). Senior Judge Hubert L. Will came to the same conclusion, Rosee v. Board of Trade, No. 63 C 1348, slip op. at 6 (N.D. Ill. Aug. 24, 1982), in rejecting one of Mr. Rosee's numerous post-judgment challenges to the 1966 decision granting summary judgment against him.

Unremarkably, Judge Paul E. Plunkett rejected the so-called "newly discovered evidence" submitted by Mr. Rosee, the very same evidence Senior Judge Will rejected in 1984, Rosee v. Board of

Trade, No. 63 C 1348, slip op. at 5 and 9-10 (N.D. Ill. Jan. 6, 1984), and concluded that Mr. Rosee's claims in this action are barred. (Pet., Appendix A at 10-12) The Seventh Circuit agreed:

Appellant has been the repeated beneficiary of remarkable judicial forbearance over the course of the nearly three decades during which he has pursued this litigation Enough, however, is enough.

(Pet., Appendix B at 2)

Judge Plunkett also held that the Commodity Futures Trading Commission's decision not to institute enforcement proceedings against the Board of Trade is presumptively unreviewable under this Court's decision in Heckler v. Chaney, 470 U.S. 821 (1985). (Pet., Appendix A at 6-8) Although the CFTC twice relied upon the Heckler doctrine in support of motions filed in the district court, Mr. Rosee

failed to address the issue. (Pet., Appendix A at 8) On appeal, moreover, Mr. Rosee made "no attempt whatsoever to address the reasoned decision of the district court." (Pet., Appendix B at 2)

The Seventh Circuit affirmed the district court's decision, adopted Judge Plunkett's opinion and imposed sanctions under Fed.R.App.P. 38 against Mr. Rosee. Although, based on Mr. Rosee's representations of dire indigency, Judge Richard A. Posner later relieved Mr. Rosee of the \$1,000 fine, nothing suggests that the court of appeals changed its conclusion that Mr. Rosee's appeal is frivolous.

**REASONS WHY THE PETITION
SHOULD BE DENIED**

1. The Record in this Case Does Not Raise the Question Presented

A CFTC decision not to take enforcement action against a futures

exchange such as the Board of Trade may or may not be judicially reviewable if that decision deprives a third-party of property without due process of law. This Court need not, however, decide that question because the CFTC has not deprived Mr. Rosee of any constitutionally protected right.

Mr. Rosee forfeited his Board of Trade membership because he failed to pay, as required by the Board's rules, an award entered against him by the Board's Arbitration Committee. Mr. Rosee previously has argued, without success, that the Board of Trade deprived him of his property interest in that membership without affording him due process of law. Rosee v. Board of Trade, 43 Ill.App.3d at 238. In a classic non sequitur, Mr. Rosee now argues (Pet. 7) that the CFTC's decision

not to institute enforcement proceedings against the Board of Trade deprived him of his membership without due process of law.

But the CFTC, which was organized in 1974, did not play any role in the Board of Trade's 1960 decision to suspend, and ultimately sell, Mr. Rosee's membership. Thus, the CFTC has not deprived Mr. Rosee of his property interest in that membership. It is, therefore, unnecessary for this Court to decide the jurisdictional question he presents for review.

2. The Petitioner's Claims Are
Barred under the Doctrines of
Res Judicata and Collateral
Estoppel

As is demonstrated by the nearly thirty-year course of litigation preceding this action, Mr. Rosee's allegations that the arbitration award entered against him was fraudulently procured, and that he has produced "newly discovered evidence" of

such fraud, are barred under the doctrines of res judicata and collateral estoppel. See, e.g., Rosee v. Board of Trade, 43 Ill.App. 3d at 238, 248; Rosee v. Board of Trade, No. 63 C 1348, slip op. at 5 and 9-10 (N.D. Ill. Jan. 6, 1984). Because Mr. Rosee has not challenged that portion of the court of appeals' decision finding all his claims barred, he is bound by that decision.

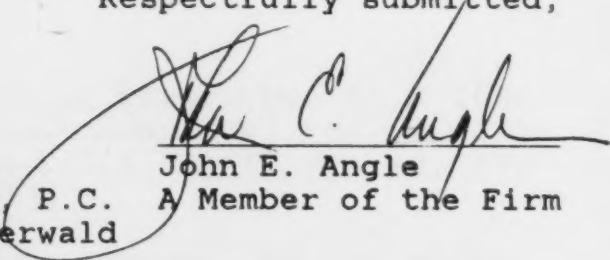
CONCLUSION

The petition does not raise any "special and important" reason for this Court to exercise its discretion to review the court of appeals' decision. See Sup. Ct. Rules 17.1, 21.1(j). For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Of Counsel:

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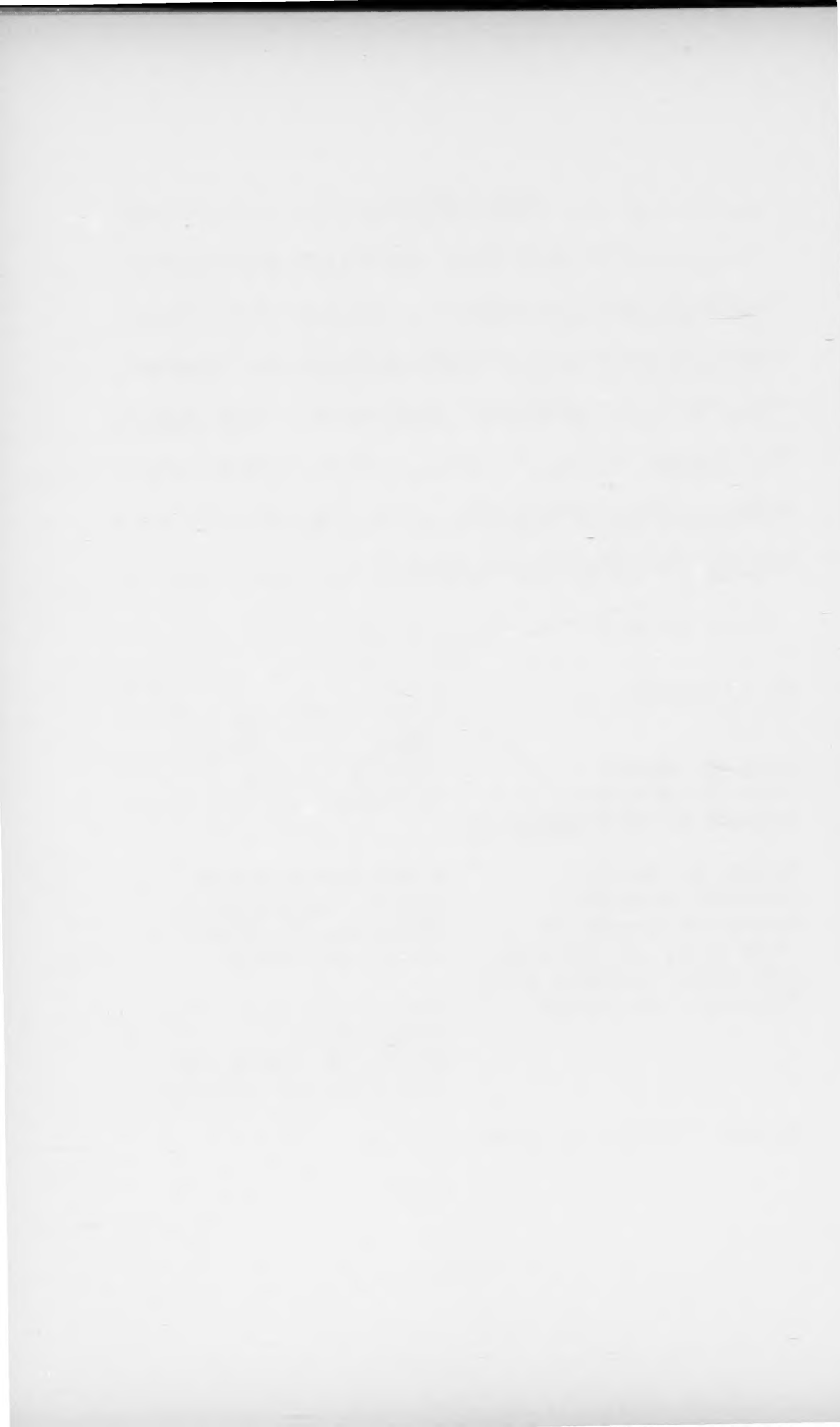
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Dated: March 3, 1988



APPENDIX A 1/

Prior Actions Against the Board of Trade

State Court:

Rosee v. Board of Trade, No. 61 S 4153
(Superior Court, Cook County) (unknown date) (nonsuited by plaintiff);

Rosee v. Board of Trade, No. 58-379
(Circuit Court, Cook County Jan. 12, 1972), aff'd in relevant part and rev'd in part, 43 Ill.App.3d 203 (1976), appeal dismissed, 65 Ill.2d 580, cert. denied, 434 U.S. 837 (1977);

Federal Court:

Rosee v. Board of Trade, No. 61 C 1066
(N.D. Ill.) (unknown date), aff'd, 311 F.2d 524 (7th Cir.), cert. denied, 374 U.S. 806 (1963);

Rosee v. Board of Trade, No. 63 C 1348
(N.D. Ill. June 13, 1966) (on removal from No. 58-379), aff'd, Nos. 15886 and 16373 (7th Cir. May 28, 1968), cert.

1/ The citations contained in this Appendix are derived from previous decisions and other materials. While the Board of Trade has made every effort to be accurate, some of the decisions cited are decades old and many are unpublished.

denied, 393 U.S. 1055, reh'g denied,
393 U.S. 1124 (1969);

Rosee v. Bergland, No. 76-1721 (D.D.C.
Apr. 26, 1977);

Post-Judgment Challenges to Adverse Judg-
ments

State Court:

Rosee v. Board of Trade, No. 58-379
(Circuit Court, Cook County Mar. 4,
1976) (denial of motion to vacate based
on newly discovered evidence), aff'd,
57 Ill.App.3d 228, cert. denied, 439
U.S. 965 (1978);

Federal Court:

Rosee v. Board of Trade, No. 63 C 1348
(N.D. Ill. June 30, 1966) (denial of
motion to vacate);

Rosee v. Board of Trade, No. 63 C 1348
(N.D. Ill. July 2, 1967) (denial of
motion to reopen judgment), aff'd, Nos.
15886 and 16373 (7th Cir. May 28,
1968);

Rosee v. Board of Trade, No. 63 C 1348
(N.D. Ill. Oct. 17, 1973) (denial of
motion to vacate);

Rosee v. Board of Trade, No. 63 C 1348
(N.D. Ill. June 24, 1976) (denial of
motion to vacate based on newly discov-
ered evidence);

Rosee v. Board of Trade, No. 63 C 1348
(N.D. Ill. Dec. 21, 1977) (denial of
motion to vacate based on newly discov-
ered evidence), aff'd, 618 F.2d 114
(7th Cir. 1980);

Rosee v. Board of Trade, No. 63 C 1348
(N.D. Ill. June 23, 1978) (denial of
motion for reconsideration);

Rosee v. Board of Trade, No. 63 C 1348
(N.D. Ill. Nov. 1978) (denial of motion
to vacate), aff'd, 618 F.2d 114 (7th
Cir. 1980);

Rosee v. Board of Trade, No. 63 C 1348
(N.D. Ill. Apr. 10, 1979) (denial of
motion to amend or modify decision);

Rosee v. Board of Trade, No. 63 C 1348
(N.D. Ill. Aug. 24, 1982) (denial of
motion to vacate based on newly discov-
ered evidence);

Rosee v. Board of Trade, No. 63 C 1348
(N.D. Ill. Jan. 17, 1983) (granting
motion for reconsideration -- allowing
access to CFTC records);

Rosee v. Board of Trade, No. 63 C 1348
(N.D. Ill. Jan. 6, 1984) (denial of
motion for leave to file supplemental
motion based on newly discovered evi-
dence);

Rosee v. Board of Trade, No. 63 C 1348
(N.D. Ill. Jan. 16, 1984) (denial of
motion for reconsideration);

Rosee v. Board of Trade, No. 63 C 1348
(N.D. Ill. Jan. 17, 1985) (denial of
motion to compel production).

